91-913

(2)

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert A. Lefkowitz, Esquire
Counsel of Record
Kevin R. Huennekens, Esquire
MALONEY, YEATTS & BARR
A Professional Corporation
801 East Main Street
600 Ross Building
Richmond, Virginia 23219
(804) 644-0313

Counsel for Respondent

29pp.

Questions Presented

1. Whether a debtor's interest in an ERISA qualified pension plan is excluded from property of the debtor's bankruptcy estate under 11 U.S.C. §541(c)(2).

2. If a debtor's interest in an ERISA qualified pension plan is not excluded from property of the debtor's bankruptcy estate, whether the debtor's interest in the pension plan is exempt from the debtor's bankruptcy estate under 11 U.S.C. §522(b)(2)(A).

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Additional Statutes Involved

1. 11 U.S.C. §548, reprinted in the appendix at p. A-1.

Statement of the Case

The issue presented in this appeal concerns the ownership of the interest of Mr. Joseph B. Shumate, Jr. ("Shumate" or "Respondent") in the Coleman Furniture Corporation Pension Plan (the "Plan").

In 1963, Coleman Furniture Corporation ("Coleman") established the Plan for the benefit of its employees. Jt. App. Vol. I. p. 11, lines 18-25. The Plan was solely funded by contributions from Coleman. Jt. App. Vol II p. 284. The Plan was amended from time to time as the tax laws changed so that the Plan would conform to the tax laws and provide retirement protection to all its beneficiaries. Jt. App. Vol. II pp. 204-382.

Coleman experienced financial difficulties, and on November 3, 1982, Coleman filed a bankruptcy petition under chapter 11 of the Bankruptcy Code. In July 1983, Coleman's case was converted to a case under chapter 7 of the Bankruptcy Code. Roy V. Creasy ("Creasy"), was appointed trustee of Coleman's bankruptcy estate. See Creasy v. Coleman Furniture Corp., 763 F.2d 656, 656-67 (4th Cir. 1985). Shumate also experienced financial difficulties and in June, 1984, he filed a bankruptcy petition under chapter 11 of the Bankruptcy Code. Shumate's case was converted to a case

under chapter 7 of the Bankruptcy Code on August 24, 1984. John R. Patterson ("Patterson" or "Petitioner") was appointed chapter 7 trustee for Shumate's bankruptcy estate.

After the filing of Coleman's bankruptcy and Shumate's bankruptcy, the administration and status of the Plan became the subject of lengthy and protracted litigation. In connection with that litigation, Shumate, Creasy and Patterson agreed to establish the value of Shumate's interest in the Plan at $250,000 (the "settlement"). The settlement was approved by the district court by order dated December 3, 1987. Jt. App. Vol. I pp. 90-96.

On April 24, 1987, Patterson filed an adversary proceeding in the Bankruptcy Court (the "Turnover Action"), to recover Shumate's interest in the Plan on behalf of Shumate's bankruptcy estate. On July 27, 1987, Shumate filed a motion in connection with a pre-existing proceeding that was pending in the district court to compel Creasy to pay over Shumate's interest in the Plan to Shumate. Jt. App. Vol. I pp. 14-16. Patterson intervened in the district court action since he claimed an interest in the Plan benefits. Jt. App. Vol. I pp. 60-61. Patterson's Turnover Action was subsequently consolidated with the action pending in the district court.

On December 16, 1987, the district court conducted a hearing to determine the entitlement to Shumate's interest in the Plan. On February 29, 1988, the lower court issued a memorandum opinion and order that denied Shumate's motion to compel. Jt. App. Vol. I pp. 140-155. On March 8, 1988, Shumate filed a motion to

reconsider and amend order. Jt. App. Vol. I pp. 156-176. The district court granted Shumate's motion but on reconsideration, the court, found no basis to alter its February 29, 1988, order. The court affirmed its ruling and granted Shumate the right to take an interlocutory appeal. Jt. App. Vol. I pp. 178-82. The Court of Appeals denied the petition to appeal.

On June 29, 1988, Shumate filed a motion for a new trial, and on August 15, 1988, Patterson filed a motion for disbursement and final order. Jt. App. Vol. I pp. 183-184 and pp. 191-195. A hearing was conducted by the district court on September 1, 1988; and on September 2, 1988, the district court granted Patterson's motion and issued a final order directing the payment of Shumate's interest in the Plan pursuant to the court's earlier ruling. Shumate appealed the September 2, 1988, order. Jt. App. Vol. I pp. 196-199.

The Court of Appeals for the Fourth Circuit initially reviewed the case on informal briefs and decided to have the case formally briefed and argued. The court assigned counsel to Shumate and heard the case. By decision dated August 12, 1991, the Fourth Circuit reversed the ruling of the district court and held that Shumate's interest in the Plan was not property of his bankruptcy estate. Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991).

During these proceedings, the parties have made a number of stipulations. First, the Plan as amended in 1976 is the plan

that governs this action.[1] Jt. App. Vol. I pp. 18 and 69. Second, the Plan contains a non-alienation provision as required under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA"). Jt. App. Vol. II p. 284. Finally, the filing and conversion dates of Coleman's and Shumate's bankruptcy cases were stipulated by the parties. Jt. App. Vol. I pp. 18, 21 and 69.

Shumate had worked for Coleman for more than 20 years. He had participated in the Plan as an employee from its inception. He worked his way up through the company until he became president of Coleman in 1979. He served in that capacity until Coleman filed its bankruptcy petition. Jt. App. Vol. I p. 109, lines 9-13. Shumate also served as administrator of the Plan during his tenure as president. Jt. App. Vol. I pp. 109-110, lines 25-25 and 1.

Shumate had voting control of a majority of Coleman's stock from 1978 to the present. Jt. App. Vol. I p. 101, lines 2-25. Shumate did not have unbridled control of Coleman's assets as evidenced by a loan agreement between Coleman and North Carolina Bank Financial Service ("NCNB-FS") which loan agreement placed restrictions on the use of Coleman's assets. Jt. App. Vol. II pp. 422-445.

[1] A copy of the Plan was submitted into evidence at the December 16, 1987, hearing in the District Court before Judge Williams.

Summary of Argument

Shumate's interest in the Plan is not property of Shumate's bankruptcy estate. Under 11 U.S.C. §541(c)(2), a restriction on the transfer of a debtor's beneficial interest in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a bankruptcy case. The court of appeals properly ruled that the phrase "applicable nonbankruptcy law" refers to ERISA as well as other federal laws and rejected the petitioner's argument that this phrase referred only to state spendthrift law.

Federal policy as enunciated by Congress and this Court supports this ruling. An overriding purpose of ERISA is to protect an employee's retirement funds for the employee's use. This policy has been stated and restated in cases such as Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990); Tenneco, Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688 (4th Cir. 1983) and Smith v. Mirman, 749 F.2d 181, 184 (4th Cir. 1984). These cases have enunciated a strong federal policy to enforce the non-alienation provision that ERISA requires be placed in all ERISA qualified pension plans.

Additionally, there is no need to graft the public policy against self-settled spendthrift trusts contained in various of the state spendthrift trust laws on to federal law in order to protect creditors. The United State Bankruptcy Code contains adequate public policy safeguards such as Section 548, the fraudulent conveyance section, to protect creditors from mischievous debtors. Under this Bankruptcy Code provision a

trustee in bankruptcy can recover for a bankruptcy estate any property that was transferred with the intent to hinder, delay or defraud creditors or that was transferred without the payment of adequate consideration.

The Petitioner argues that a reason to grant a *writ of certiorari* is the need to have uniformity in the districts regarding the federal law governing pension plans. However, if the Petitioner's argument is accepted, the spendthrift trust law of each individual state would be applied in any circuit. Clearly greater inconsistency would result from district to district as the vagaries of each state's public policy as evidenced in its individual spendthrift trust law was applied to federal law.

Because of the decision it rendered, the court of appeals did not need to decide whether 11 U.S.C. §522(b)(2)(A) created a federal exemption for ERISA qualified pension plans. The Petitioner nevertheless invites this Court to decide this issue. The Petitioner supports his interpretation of 11 U.S.C. §522 on the decisions from various courts of appeal that find that ERISA is not an exemption under "Federal law" as that term is used in 11 U.S.C. §522(b)(2)(A).

The decisions upon which the Petitioner relies place undue emphasis on the inconclusive legislative history of the Bankruptcy Code. These decisions ignore other federal court decisions, decided outside of the bankruptcy context, that recognize the existence of a federal exemption for ERISA quali-

fied pension plan benefits. These decisions also misinterpret the reason for the existence of the non-alienation provision in ERISA plans.

The decision reached by the Court of Appeals for the Fourth Circuit is correct. The decision is supported by ample authority from this Court, and the decision conforms with the federal policy that ERISA qualified pension benefits should be protected and made available to their beneficial owners. Accordingly, this Court should deny the petition for *writ of certiorari*.

Argument

I. The Court of Appeals Properly Ruled That a Debtor's Interest in an ERISA Qualified Pension Plan is Excluded from a Debtor's Bankruptcy Estate.

The court of appeals ruled that Shumate's interest in the Plan was excluded from his bankruptcy estate under 11 U.S.C. §541(c)(2).[2] This section of the Bankruptcy Code excludes certain of a debtor's property interests from the definition of property of the debtor's bankruptcy estate. This section states:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable <u>under applicable nonbankruptcy law is enforceable in a case under this title</u> [11 U.S.C. §101 <u>et</u> <u>seq</u>.].

[2] Further reference to Title 11, United States Code, will be designated as Bankruptcy Code Section.

11 U.S.C.S. §541(c)(2) (Law. Co-op. 1986) (emphasis added). The court of appeals ruled that the "applicable nonbankruptcy law" to which this statute refers includes ERISA as well as all other federal laws.

In contrast, the Petitioner argues that "applicable non-bankruptcy law" refers only to state spendthrift trust law. In reaching this position, the Petitioner relies upon the authority of a long line of cases which invalidate pension trusts vis-a-vis the debtor for public policy reasons when that debtor is both settlor and beneficiary of the trust. <u>See</u> <u>Goff v. Taylor (In re Goff)</u>, 706 F.2d 574 (5th Cir. 1983). This public policy prevents a person from establishing a spendthrift trust to shield his own assets from his creditors. <u>See</u> <u>Restatement (Second) of Trusts</u> §156 (1959).

A. The Term "Applicable Nonbankruptcy Law" in 11 U.S.C. §541(c)(2) Is Not Limited to State Spendthrift Trust Law.

In <u>Anderson v. Raine (In re Moore)</u>, 907 F.2d 1476 (4th Cir. 1990), the court of appeals held (1) that the term "applicable nonbankruptcy law" refers to <u>all</u> laws, state <u>and</u> federal, under which a transfer restriction is enforceable" and (2) that the required non-alienation provision of a qualified ERISA pension plan qualifies it for exclusion from a debtor's bankruptcy estate under 11 U.S.C. §541(c)(2). <u>See</u> <u>also</u>, <u>John Handcock Mutual Life Ins. Co. v. Watson (In re Kincaid)</u>, 917 F.2d 1162 (9th Cir. 1990)

(Concurring opinion states that the narrow reading of the phrase "applicable bankruptcy law" in Daniel is incorrect); Forbes v. Lucas (In re Lucas), 924 F.2d 597 (6th Cir. 1991), cert. denied, 111 S.Ct. 2275 (1991); and In re Ralstin, 61 B.R. 502 (Bankr. D. Kan. 1986).

The ruling in Anderson draws the Petitioner's analysis into question. The premises for the Petitioner's argument is that the term "applicable nonbankruptcy law" refers only to state law. He applies the public policy against self-settled spendthrift trusts to bring a qualified ERISA plan into a debtor's estate. Such an analysis improperly interjects state law onto federal ERISA law and ignores the rationale behind the creation of ERISA.

ERISA's overriding purpose is to guarantee the security of an employees' retirement income. Anderson, 907 F.2d at 1479-80; see also 29 U.S.C.S. §1001 (Law. Co-op. 1990). The security of employee retirement benefits should not be dependent on the "particularities of state spendthrift trust law." Anderson, 907 F.2d at 1480. There exists a strong federal policy to protect the sanctity and purpose of ERISA qualified employee benefit plans. Id.; see Smith v. Mirman, 749 F.2d at 184 (in declaring invalid an assignment of an ERISA qualified pension plan prior to a bankruptcy filing, the Court observed, "[w]e see a danger in eroding through exception the anti-alienation policy of ERISA. That entire legislation was aimed at guaranteeing the security of retirement income for American workers.").

Other case law also evidences a strong federal policy to enforce the non-alienation provision required in ERISA qualified employee benefit plans. For example in Tenneco, Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688 (4th Cir. 1983) a bank sought to garnish a debtor's accrued interest in an ERISA qualified thrift and stock ownership plan. On appeal, the Court of Appeals for the Fourth Circuit ruled that the debtor's interest in the plan was exempt from a third party creditor's garnishment. That court reasoned, "[t]he funds here had been accumulated under a general plan for retirement, and the statutory scheme clearly contemplates that they should remain available for that purpose, even though the employee might obtain employment with another employer having a qualified plan, or quit, or otherwise become entitled to a lump sum distribution." Tenneco, Inc., 698 F.2d at 690.

In McLean v. Central States, Southeast and Southwest Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985), a debtor sought to fund his chapter 13 plan by direct payments from his retirement plan to the trustee. The court held that the retirement plan benefits were not property of the estate and, accordingly, could not be made subject to a direct payment order. Although that ruling was based on a decision that the pension fund qualified as a spendthrift trust under Illinois law, the ruling illustrates a federal policy to enforce the non-alienation provision of an ERISA qualified plan.

Grafting the state law provisions governing spendthrift trust public policy onto ERISA qualified plans that are regulated by federal law contravenes ERISA's policies. Such grafting would effectively rewrite the federal statute. The preemption provision of ERISA protects qualified plans from having to comply with vagaries of state spendthrift law before they are exempt from creditor attack. See 29 U.S.C.S. §1144(a) (Law. Co-op. 1990).

The Petitioner argues that a reason to grant a *writ of certiorari* is the need to have consistency among the districts regarding the federal law dealing with pension plans; however, the thrust of the Petitioner's argument would cause inconsistency in federal law. In effect, the Petitioner argues that courts should apply each individual state's spendthrift trust law in interpreting ERISA's anti-alienation provisions in a bankruptcy case. This result would cause greater inconsistency among the districts and is inconsistent with federal policy to enforce the non-alienation provision of ERISA.

Federal courts have recognized that state law may be used to create federal common law only if the state law is not inconsistent with federal law. See Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986). The adoption of the "public policy" exception applicable to spendthrift trusts utilized by the court in Goff is inconsistent with ERISA's policy of protecting pension benefits for plan participants and their dependents. Accordingly, the Goff reliance on the public policy excepting

spendthrift trusts should not be applied to limit a beneficiary's interest in an ERISA qualified pension plan as occurred in Daniel v. Security Pacific Nat'l Bank (In re Daniel), 771 F.2d 1352, cert. denied, 475 U.S. 1016 (9th Cir. 1985), Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985), Samore v. Graham (In re Graham), 726 F.2d 1268, 1269 (8th Cir. 1984), and Goff, 706 F.2d 574 (5th Cir. 1983).[3]

Even if one accepts the application of the public policy exception applicable to state spendthrift trusts, the control that Shumate exercised over Coleman does not warrant the application of the policy. It has been established that "limited control [over a pension plan] may be permitted if its exercise would create such a hardship for the debtor as to discourage its exercise except in dire circumstances." In re Pettit, 61 B.R. 341, 346 (Bankr. W.D. Wash. 1986). Although Shumate did not exercise direct control over the Plan as a beneficiary, the Petitioner argues that the control that Shumate exercised as an officer and director was sufficient to control disposition of the Plan. Additionally, the Petitioner argues that the control that

[3] Allowing the trustee to obtain the pension benefits could destroy the entire Plan's tax qualification rendering the Plan and its benefits taxable to other beneficiaries. Private Letter Ruling No. 8910035, CCH Letter Ruling Reports (1988). Although Private Letter Rulings cannot be cited as precedent, this letter ruling demonstrates the very real possibility for the destruction of plan benefits for other plan participants, and it further illustrates why ERISA's public policy to protect plan benefits should override any competing policy or concern.

Shumate could potentially exercise over the Plan warrants the inclusion of the Plan interest in Shumate's bankruptcy estate.

This argument ignores the true character of Shumate's control. Although Shumate might have had the legal ability to terminate the Plan and take any remainder left in the Plan, he did not because loan documents between Coleman and NCNB-FS limited Mr. Shumate's ability to take such action. The court of appeals correctly dismissed this argument. The control that Mr. Shumate possibly could have exercised is similar to the hardship control that courts have allowed beneficiaries to exercise without destroying the non-alienation aspect of pension benefits. See Gennet v. ICMA Retirement Corp. (In re Forbes), 65 B.R. 58 (Bankr. S.D. Fla. 1986)(ability to obtain benefits if beneficiary terminates employee is not sufficient control to defeat "spendthrift nature" of pension).

B. Current Bankruptcy Law Adequately Protects a Trustee from Debtors Who Exert Control over a Pension Plan.

The public policy enunciated in Goff that the person in control is deemed the settlor of the trust because of potential mischief that could result from the control over property is adequately protected by Bankruptcy Code Section 548. This section allows a trustee to avoid a debtor's transfer of property that was made within one year of the filing of the bankruptcy petition and that was made with the intent to hinder, delay or

defraud creditors. Thus, if a debtor exerts control over a corporation as opposed to having the mere potential to do so that is prejudicial to the interests of creditors, then Bankruptcy Code Section 548 empowers the trustee in bankruptcy to avoid any transaction resulting in a depletion of the bankruptcy estate that stems from the control. The trustee can then recapture the property for the benefit of creditors. The fraudulent conveyance provision set forth in the Bankruptcy Code sufficiently addresses the public policy concerns enunciated in Goff.

In this case there has been no suggestion that Shumate exercised control over the corporation to transfer assets to the Plan in order to defraud, hinder, or delay creditors. Patterson did not attempt to avoid Shumate's interest in the Plan under Bankruptcy Code Section 548. Rather it was the unexercised potential of control upon which the Petitioner focused. There is no need in this case to apply the public policy exception applicable to spendthrift trusts upon which the court in Goff focused because there has been no harm to creditors.

II. Assuming That a Debtor's Interest in a Pension Plan is Property of the Bankruptcy Estate, the Interest in the ERISA Qualified Pension Plan is Exempted from the Bankruptcy Estate by the Operation of 11 U.S.C. §522(b)(2)(A).

The court of appeals did not decide if an ERISA qualified pension plan was exempt from a bankruptcy estate since it determined that such a pension plan was not property of the bankruptcy estate. The Petitioner seeks to have this Court determine this issue should the *writ of certiorari* be granted. Accordingly, the respondent presents the following argument in support of his position.

Bankruptcy Code Section 522(b)(2)(A) provides:

> Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is-
>
> . . .
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately proceeding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; . . .

11 U.S.C.S. §522(b)(2)(A) (Law. Co-op. 1986) (emphasis added).

The provisions of ERISA, 29 U.S.C. §1056(d)(1), and the Internal Revenue Code, 26 U.S.C. §401(a)(13) which mandate non-assignability constitute a "federal law" exemption under Bankruptcy Code Section 522(b)(2)(A). This issue has been the subject of some debate. Compare Barr v. Hinshaw (In re Hinshaw), 23 B.R. 233 (Bankr. D. Kan. 1982) with In re Goff, 206 F.2d at 589; In re Lichstrahl, 750 F.2d at 1488; In re Graham, 726 F.2d 1268; and In re Daniel, 771 F.2d at 1360-61. Some courts reject this argument because the House and Senate reports for Bankruptcy Code Section 522 failed to list ERISA under its "laundry list" of property that could be exempted as federal law. Additionally, some courts observe that all of the federal law included in the legislative laundry list are "peculiarly federal in nature, created by federal law or related to industries traditionally protected by the federal government." Creasy v. Coleman Furniture Corp., 83 B.R. 404, 410 (W.D. Va. 1988) (citing In re Lichstrahl, 750 F.2d at 1491).

A recent opinion, In re Komet, 104 B.R. 799 (Bankr. W.D. Tex. 1989), questions the authority upon which courts have rejected this argument. In Komet, husband and wife chapter 11 debtors sought to exempt their interest in a pension and a profit sharing plan from their bankruptcy estate. After reviewing the cases interpreting Code Section 522(b)(2)(A), the Texas bankruptcy court concluded that the plans qualified as federal law exemptions under 11 U.S.C. §522(b)(2)(A).

In Komet, the court examined federal and state cases that have interpreted ERISA's non-alienation provision, 29 U.S.C. §1056(d), and ERISA's preemption statute, 29 U.S.C. §1144. The court noted that most of the courts that have examined this issue have concluded that these provisions override the operation of

state collection law, thereby creating a nonbankruptcy exemption for ERISA qualified plans. In re Komet, 104 B.R. at 806.

Tenneco, Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688 (4th Cir. 1983), supports the conclusion reached in In re Komet. In Tenneco, the court ruled that a debtor's interest in a qualified ERISA plan was exempt from a third party creditor's garnishment. Accord Smith v. Mirman, 749 F.2d at 184 (an assignment of an ERISA qualified pension plan was invalid). Tenneco and the numerous cases cited in In re Komet illustrate the existence of a body of federal law that has developed around ERISA's mandatory non-alienation provision and that has effectively granted this provision nonbankruptcy exemption status. It is important to note that cases such as Tenneco rely upon the uniformity of non-alienation provision to protect plan benefits, and not the vagaries of state spendthrift law. In re Komet, 104 B.R. at 806-07.

The Komet court next observed that the only impediment to extending ERISA's federal exemption status to bankruptcy cases was "strong" dicta in In re Goff. The court observed that In re Goff's interpretation of the term "other federal law" in Code Section 522(b)(2)(A) was flawed because:

(1) Goff mistakenly characterizes the function of the anti-alienation language as applying to tax treatment only;

(2) Goff misinterprets the structure and purpose of the Bankruptcy Code and finds "a 'congressional policy' antithetical to the retention of retirement benefits where precisely the opposite policy is indicated;"

(3) Goff misinterprets the legislative history of Bankruptcy Code Section 522(b)(2)(A); and

(4) Goff mistakenly presumed that the Bankruptcy Code implicitly repealed ERISA's anti-alienation provision.

In re Komet, 104 B.R. at 809.

In re Goff and its progeny[4] incorrectly focus on the tax aspects of ERISA's non-alienation provision. Although the provision is required for companies to obtain favorable tax treatment for plan contributions, the provision accomplishes more than the granting of tax benefits. It acts as a carrot to employers to insure that ERISA's labor purpose, the protection of employee retirement benefits, is accomplished. See, In re Komet, 104 B.R. at 809; 29 U.S.C.S. §1001 (Law. Co-op. 1990). Accordingly, Goff incorrectly reads with myopic vision the purpose of the non-alienation provisions of ERISA.

In re Goff also fails to recognize the genesis of the Bankruptcy Code's policies of fresh start and exemption. In re Goff assumed that while the Bankruptcy Reform Act of 1978 expanded the scope of the bankruptcy estate, it also sought to symmetrically limit the debtor's possible exemptions. As the Komet court illustrates, Goff's interpretation is incorrect. In revising the concept of property of the estate, the Bankruptcy Reform Act of 1978 expanded the concept of property to enhance uniformity in bankruptcy proceedings and to broaden the new

[4] In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); In re Daniel, 771 F.2d 1352 (9th Cir. 1985)

bankruptcy court's jurisdiction. This expansion took the former Bankruptcy Act's procedure of determining estate property and centralized it in the new bankruptcy courts. This expansion also made exempt property part of the bankruptcy estate. However, when it expanded the definition of property of the estate, Congress had to amend Bankruptcy Code Section 541 to eliminate spendthrift trust benefits as well as interests held in trust for others from inclusion as property of the estate. By this amendment, Congress merely intended to maintain the status that these interests in property had under former law. See Komet, 104 B.R. at 810-11.

In dealing with exemptions, Congress enacted Bankruptcy Code Section 522. This section was intended to honor existing exemption law in bankruptcy. There was no intent to exclude federal exemptions that were reorganized by the former Bankruptcy Act. See In re Komet, 104 B.R. at 811-13. Accordingly, an examination of the concepts of "property of the estate" and "exemptions" illustrates that Goff's interpretation of their interplay is incorrect.

The Petitioner places significant importance on ERISA's absence from the laundry list of federal exemptions in the legislative history of Code Section 522. According to the Petitioner, this absence excepts ERISA from the "other federal exemptions" of §522(b)(2)(A). As discussed earlier, this position is inconsistent with the recognition of a nonbankruptcy exemption for ERISA enunciated in the cases above. If this Court

accepts Goff's interpretation of Code Section 522(b)(2)(A) as argued by the Petitioner, then an individual outside of bankruptcy would have greater exemption rights than someone in bankruptcy. This untenable position necessarily results if Goff is to be reconciled with Tenneco and other federal cases.

As the court noted in Komet, Congress did not intend to change prior law by enacting Code Section 522; accordingly, Code Section 522 should be read with neutrality vis-a-vis existing exemptions. Goff disregards this policy. Goff concludes that the failure to list ERISA on the legislative laundry list is dispositive of intent. The court in Komet observes that the statute is clear and does not require a strained reading of legislative intent to derive its meaning. In re Komet, 104 B.R. at 814. Goff's reading is contrary to statutory construction. Id.

Lastly, Goff found that the Bankruptcy Code implicitly repealed or altered ERISA. The Komet court suggests that this ruling was in error since Goff found a conflict without first trying to read the statutes in concert. The court in Komet observed:

> Goff first found a subsequent, generalized congressional intent to limit pension plans in bankruptcy, then concluded that intent 'trumped' the earlier congressional intent expressed in ERISA to protect those very same pension plan. For want of a better term we shall call this selective implicit amending 'repeal by implication.'

In re Komet, 104 B.R. at 815; accord McLean, 762 F.2d 1204 (4th Cir. 1985)(the court rejected a similar "repeal by implication" argument involving a conflict between [1] 29 U.S.C. §1056(d)(1); 26 U.S.C. §401(a)(13), and [2] 11 U.S.C. §§541(c)(1); 522(d)(10(E) and 1325(b)).

Komet is a well-reasoned opinion that seriously examines the weaknesses of the often cited case, In re Goff, and a growing number of courts have approved or adopted the analysis used by the Komet court. See In re Burns, 108 B.R. 308 (Bankr. W.D. Ok. 1989)(en banc opinion); In re Conroy, 110 B.R. 492, 497 (Bankr. D. Mont. 1990)(although court was obligated to follow the Ninth Circuit case, In re Daniel, the court found Komet persuasive).

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990), provides additional support for the view expressed in In re Komet. In Guidry, a union official had been convicted of embezzling union funds. After the embezzlement was uncovered, the plan's administrators refused to pay over to Guidry any benefits. The plan administrators argued that the official had forfeited his rights to benefits as a result of his criminal activity. Guidry sued to recover his benefits. Although the district court rejected the forfeiture argument, the court imposed a constructive trust on the plan benefits. Guidry, 493 U.S. at 367-70.

This Court reversed the imposition of a constructive trust on the ERISA qualified plan benefits. This Court wrote:

> Section 206(d) [29 U.S.C. §1056(d)] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Guidry, 493 U.S. at 370. This strong policy pronouncement states that ERISA's non-alienation provision is a provision that creates a federal exemption under 11 U.S.C. §522(b)(2)(A). See In re Starkey, 116 B.R. 259 (Bankr. D. Colo. 1990).

Conclusion

For the reasons stated above, the respondent, Joseph B. Shumate, Jr., asks that this Court deny the Petition for a Writ of Certiorari filed by John R. Patterson, Trustee.

Respectfully Submitted,

By: Robert A. Lefkowitz

Robert A. Lefkowitz, Esquire
Counsel of Record
Kevin R. Huennekens, Esquire
MALONEY, YEATTS & BARR
A Professional Corporation
801 East Main Street
600 Ross Building
Richmond, Virginia 23219
(804) 644-0313
Counsel for Respondent

11 USCS § 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title [11 USCS § 544, 545, or 547], a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101(34), 741(5), or 761(15) of this title [11 USCS §§ 101(34), 741(5), 761(15)], or settlement payment, as defined in section 101(35) or 741(8) of this title [11 USCS §§ 101(35), 741(8)], takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title [11 USCS §§ 741(5), (15)], or settlement payment, as defined in section 741(8) of this title [11 USCS § 741(8)], in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2600; July 27, 1982, P. L. 97-222, § 5, 96 Stat. 236; July 10, 1984, P. L. 98-353, Title III, Subtitle F, § 394, Subtitle H, § 463, 98 Stat. 365, 378; Oct. 27, 1986, P.L. 99-554, Title II, Subtitle C, § 283(n), 100 Stat. 3117; June 15, 1990, P.L. 101-311, Title I, § 104, Title II, § 204, 104 Stat. 268, 269.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Section 402(a) of Act Nov. 6, 1978, provided that this section "shall take effect on October 1, 1979.".

Amendments:

1982. Act July 27, 1982, in subsec. (d)(2)(B), substituted ", forward contract merchant, stockbroker, or securities clearing agency", for "or forward contract merchant", inserted "741(5)", inserted ", or settlement payment, as defined in section 741(8) of this title", and substituted "value to the extent of such payment." for "value.".

1984. Act July 10, 1984, in subsec. (a), in the introductory matter, substituted "if the debtor voluntarily or involuntarily" for "if the debtor", in para. (1), substituted "was made" for "occurred", in para. (2)(B)(ii), inserted "or a transaction" preceding ", or was"; in subsec. (c), inserted "or may retain" and deleted ", may retain any lien transferred, following "transferred" "; in subsec. (d), in para. (1), substituted "is so" for "becomes so far", substituted "applicable law permits such transfer to be" for "such transfer could have been", and substituted "is made" for "occurs", in para. (2), in subpara. (A), deleted "and" following "debtor;", in subpara. (B), inserted "financial institution," substituted "; and" for the concluding period, and added subpara. (C).

1986. Act Oct. 27, 1986 (effective 30 days after enactment on 10/27/86, as provided by § 302(a) on such Act, which appears as 28 USCS § 581 note), in subsec. (d)(2)(B), substituted ", financial institution" for "financial institution,".

1990. Act June 25, 1990, in subsec. (d)(2), in subpara. (B), deleted "and" following the concluding semicolon and inserted "101(34)," and "101(35) or", in subpara. (C), substituted "; and" for a concluding period, and added subpara. (D).

Other provisions:

Effective date of amendments made by Act July 10, 1984. Act July 10, 1984, P. L. 98-353, Title III, Subtitle K, § 553(a), 98 Stat. 392, which appears as 11 USCS § 101 note, provided that the amendments made to this section by such Act "become effective to cases filed 90 days after the date of enactment" on July 10, 1984.

Legislative History

This section is derived in large part from section 67d of the Bankruptcy Act. It permits the trustee to avoid transfers by the debtor in fraud of his creditors. Its history dates from the statute of 13 Eliz. c. 5 (1570).

The trustee may avoid fraudulent transfers or obligations if made with actual intent to hinder, delay, or defraud a past or future creditor. Transfers made for less than a reasonably equivalent consideration are also vulnerable if the debtor was or thereby become insolvent, was engaged in business with an unreasonably small capital, or intended to incur debts that would be beyond his ability to repay.

The trustee of a partnership debtor may avoid any transfer of partnership property to a partner in the debtor if the debtor was or thereby became insolvent.

If a transferee's only liability to the trustee is under this section, and if he takes